United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2017

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P/S

To be argued by

JOSEPH E. LYNCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. TIMOTHY MORGAN,

Petitioner-Appellee,

-against-

75-2017

ROBERT HENDERSON, Superintendent
Auburn Correctional Facility,

Respondent-Appellant.

BRIEF FOR PETITIONER-APPELLEE

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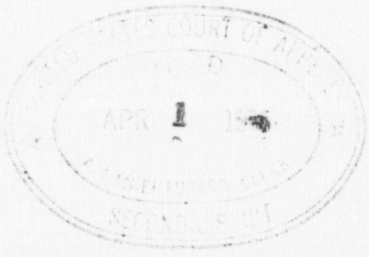

TABLE OF CONTENTS

			Page
POINT I	-	THE DISTRICT COURT PROPERLY DETERMINED THE ISSUE OF FACT OF WHETHER OR NOT THE APPELLEE KNEW THAT INTENT WAS AN ELEMENT OF THE CRIME TO WHICH HE WAS PLEADING.	1
POINT II	-	THE DISTRICT COURT PROPERLY APPLIED THE LAW TO THE FACTS DEVELOPED AT THE EVIDENTIARY HEARING.	3
POINT III	-	THE APPELLEE CONTENDS THAT HE WAS NEVER ADVISED OF THE ESSENTIAL ELEMENTS OF THE CRIME TO WHICH HE WAS PLEADING AND THAT CONSEQUENTLY HIS PLEA WAS INVALID.	6
POINT IV	-	THE DISTRICT COURT'S DETERMINATION SHOULD BE AFFIRMED ON THE ADDITIONAL GROUNDS REJECTED BY THAT COURT THAT THE APPELLEE'S PLEA WAS NOT IN ACCORDANCE WITH DUE PROCESS BECAUSE HE WAS NEVER ADVISED OF THE OUTER LIMITS OF THE RISK TO WHICH HE WAS SUBJECTING HIMSELF.	8
CONCLUSION			11

TABLE OF CASES

	Page
Brock v. LaVallee 306 F. Supp. 159 (S.D.N.Y., 1969)	4
Bruce v. United States 379 F. 2d 113 (D.C. Cir. 1967)	7
Marvel v. United States 380 U.S. 362 (1965)	8
McCarthy v. United States 394 U.S. 459 (1969)	6

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The appellee contends that the District Court order should be affirmed, not only because that Court was correct in finding that the appellee's plea was invalid because he was never advised that intent was an element of the crime, but also on the additional grounds rejected by the District Court that the appellee never knew the maximum limits of the punishment to which he was subjecting himself by such a plea.

POINT I

THE DISTRICT COURT PROPERLY DETERMINED THE ISSUE OF FACT OF WHETHER OR NOT THE APPELLEE KNEW THAT INTENT WAS AN ELEMENT OF THE CRIME TO WHICH HE WAS PLEADING.

The evidence on this issue came from the appellee and the two defense counsel. The appellee testified that he had never been told that intent was an element of the crime. (H13a, 14a) (The same references will be used in the appellee's brief as set forth on page 3 of the appellant's brief.

Attorney Rinehart admitted that he had never discussed the elements of the crime of murder in the second degree with the appellee (H53a) but his co-counsel Mr. Best testified that he "thought" but could not be certain that he had informed the appellee of the difference between murder in the first and second degree (H66a). On the overall record, the District Court found as a matter of fact that the appellee had indeed never been told of an essential element of the crime to which he was pleading.

The appellant argues that this finding is so clearly erroneous that it has to be reversed by this Court. Its reasoning apparently is that the District Court should have disbelieved the appellee, ignored Mr. Rinehart's testimony and found that Mr. Best, despite his own uncertainty, had actually informed the appellee that intent was an element of the crime to which he was pleading.

Obviously, the District Court saw these witnesses and was in the best position to determine the weight to be given to their testimony. It seems fair to conclude that the Court decided that Mr. Best's recollection was too vague to be of probative value. Obviously, Mr. Best would have a recollection in this case of considering the elements that made up the charge of second degree murder since he testified at page 67a that he had researched the law on this point. It may well be that the Court held it was this aspect of the case that he was vaguely recalling, and innocently but mistakenly recalling it in the context of a conversation with

the appellee. In any event, the Court on the record found that the appellee was never advised that intent was a necessary element of the crime and in the light of that testimony before it, the appellee respectfully submits that that determination is not only factually sound but that any other determination would have been erroneous as a matter of law.

POINT II

THE DISTRICT COURT PROPERLY APPLIED THE LAW TO THE FACTS DEVELOPED AT THE EVIDENTIARY HEARING.

The appellant also attacks the decision as being legally incorrect. It contends in Point I of its brief that under the totality of circumstance rule the plea should have been held to be voluntary.

The argument here is that since the appellee was represented by counsel, since he had been given a psychiatric examination which determined he was able to stand trial, since when he did not understand certain apsects in the pleading procedure he indicated his lack of understanding and inferentially, tnerefore, must have understood the remainder of the proceedings when he did not so indicate, and since he had waited approximately five years following the date of the sentence, his plea must have been an intelligent and voluntary one.

Obviously, all of tnese factors have been considered as significant in certain cases on the question of whether a plea was a valid one, but none of these factors or the

cases cited by the appellant as authority for them are helpful to this Court in deciding this appeal.

Of what significance is a case such as United States ex rel. Brock v. LaVallee, 306 F. Supp. 159 (S.D.N.Y., 1969) which says in effect that in the absence of evidence to the contrary the Court will assume that the accused was advised by his counsel of the effects of his plea. Obviously, the District Court in this case could not make such an assumption since that is the crucial issue which it had to resolve.

Similarly, the fact that the appellee had been determined psychiatrically capable of standing trial and the fact that at the pleading stage he indicated on occasion his lack of understanding is of no significance in the posture of this case where the issue is not whether he was capable of understanding or did understand, but whether in fact he was ever advised that intent was an element of the crime. The appellee on this appeal is not contending that he didn't have the intelligence to understand what was told him. He is stating and the District Court has found that essential information needed to make his plea an intelligent one was never communicated to him.

On the question of the relationship of the time when the writ was brought and the plea was entered, the record shows that the appellee never became aware that intent was an essential element of the crime of murder in the second degree until shortly before he filed the writ. (H13a)

Furthermore, the People have not been prejudiced by this delay. The defense counsel upon whom they relied at the evidentiary hearing were available and testified.

Interestingly enough, it could well be that if the appellee had been the only witness at the evidentiary hearing the Court's decision might have been different. The strange aspect of this case is that the People's own witnesses may well have required the Court to reach the decision which it did because they supplied clear proof, in the District Court's judgment, that the appellee's constitutional rights were not protected.

The totality of circumstance rule relied upon by the appellant may be and has been in many cases a helpful judicial tool to determine the voluntariness of a person's plea but it obviously is not helpful or determinative in this case on the issue of whether the appellee knew that an essential element of the crime of murder in the second degree was an intent to kill the deceased.

The appellant comes closer to addressing itself to this proposition in its contention, also in Point I of its brief, that intent could be found in the manner in which the death occurred and particularly from the number of stab wounds inflicted. This would be a sound argument if the question which this Court had to decide was whether there was sufficient evidence in the record to prove intent, but unfortunately for the appellant that is not the issue. The

question for this Court is whether the appellee knew that intent was an essential element of the crime to which he was pleading. The record is clear that he did not know and therefore the District Court's determination should be affirmed.

POINT III

THE APPELLEE CONTENDS THAT HE WAS NEVER ADVISED OF THE ESSENTIAL ELEMENTS OF THE CRIME TO WHICH HE WAS PLEADING AND THAT CONSEQUENTLY HIS PLEA WAS INVALID.

The appellant's attack on the District Court's decision in Point II of its brief is based upon an erroneous interpretation of that decision. The appellant contends that the District Court is saying that for any plea to be valid there must be proof of a prior recitation to the accused of the formal legal elements of the crime. The appellant reached this conclusion apparently because the District Court cited as authority for its decision the case of McCarthy v. United States, 394 U.S. 459 (1969). But neither the decision being appealed from nor the McCarthy decision imposes any such conditions in order to validate guilty pleas. What they both say is that to intelligently plead a defendant has to know to what he is pleading. The McCarthy case phrased that knowledge as being an understanding of the law in relation to the facts.

There is no issue in this case of whether McCarthy is retroactive in application since the rule that an intelligent plea requires an understanding of the elements of the crime charged and the consequences of the plea long antedated McCarthy and certainly was the rule at the time that the appellee pleaded

guilty to murder in the second degree.

The case of Bruce v. United States, 379 F. 2d 113 (D.C. Cir. 1967) set forth in the appellant's brief is certainly not authority for the proposition that an intelligent plea can be made without an understanding of the essential elements of the crime to which the plea is addressed. The decision in the Bruce case certainly can support the proposition, as contended in the appellant's brief, that the accused Bruce was not advised by his counsel that intent was an essential element of the crime of robbery to which he was pleading. The problem with the case from the appellant's standpoint, however, is that that defect was corrected by the sentencing Judge who during the course of his interrogation made it abundantly clear to the accused prior to plea that intent was an element of the crime to which he was pleading. That, of course, is what distinguishes Bruce so dramatically from the present case. No one advised this appellee, certainly not the sentencing Court, of the elements of the crime to which he was being asked to plead.

The last point in the appellant's brief to the effect that the petitioner's plea was a reasoned, intelligent, voluntary plea among available alternatives simply assumes the point in issue, i.e. did the appellee have the necessary

information to make such an intelligent choice. It is clear that he did not because he lacked the necessary information to determine the risk involved in each alternative.

POINT IV

THE DISTRICT COURT'S DETERMINATION SHOULD BE AFFIRMED ON THE ADDITIONAL GROUNDS REJECTED BY THAT COURT THAT THE APPELLEE'S PLEA WAS NOT IN ACCORDANCE WITH DUE PROCESS BECAUSE HE WAS NEVER ADVISED OF THE OUTER LIMITS OF THE RISK TO WHICH HE WAS SUBJECTING HIMSELF.

Nothing can be more important to a person accused of a crime than to know the maximum consequences that may occur if he pleads guilty to that crime. Consequently, due process requires that prior to his plea he be informed of the outer limits of the risk to which he is exposing himself by that plea. Marvel v. United States, 380 U.S. 362 (1965). Not only was the relator not informed of the sentence to which he was exposing himself, he was actually misinformed and consequently his plea violated the due process requirements of the Constitution. The appellee's testimony on this aspect of the matter is contained on pages H15a thru H25a and in substance it was to the effect that he was never told what punishment he might receive by pleading guilty to murder in the second degree.

Attorney Best a page H62a stated that he was aware of the punishment and that the appellee was aware of the punishment. This, of course, obviously was a conclusion on

his part and no attempt to explain this was made in his direct examination.

The principal testimony on this issue offered by the appellant came from Attorney Rinehart and may be briefly set forth as follows:

At H46a, line 22

THE COURT: Did you advise the defendant of that (the sentence).

THE WITNESS: We did, yes, sir.

At H49a, line 4

THE COURT: In this particular instance you are satisfied you knew and the defendant knew exactly what the sentence was going to be.

THE WITNESS: Yes, because I felt that the extra five years was putting it on too hard...But yes, I knew what the sentence was going to be and I told my client.

At H49a, line 23

THE WITNESS: At that time, my recollection is, we were there in a room, and thequestion was whether we would enter a plea or get ready to proceed to trial, and my recollection is he wanted to get rid of it and I didn't go into details about the consequences or anything. (emphasis supplied)

At H51a, line 16

THE WITNESS: I told him of course what the punishment would be, yes.

At 57a, line 18

Q Mr. Rinehart, is it a fair summary of what you told this young man after talking with the District Attorney and possibly with the

Judge and knowing the differences between sentences, did you tell him in substance that he would be sentenced to twenty-five years in prison?

A. I am positive of that.

Q. You are positive of that?

A. Yes.

At H81a, line 7

MR. LYNCH: Mr. Rinehart, did you tell Mr. Morgan that the sentence he would receive was twenty-five years or did you tell him twenty-five years to life, or do you know for certain.

MR. RINEHART: I think it was twenty-five years. I don't know if I put that "to life" in there. I am not sure.

MR. LYNCH. So you may have told him twenty-five years.

MR. RINEHART: Yes.

It is submitted that on this record the District Court should have found that the appellee was never told and never knew what the outer limits of his punishment would be. The first point that should be made with respect to Mr. Rinehart's testimony is, of course, that although he couldn't be certain he recognized that he may have told the appellee that the punishment which he would receive would be twenty-five years and not what he actually could and did receive - twenty-five years to life.

The appellant in respect to Mr. Best's testimony on the intent issue thinks that even though that testimony was couched in terms of uncertainty, it should be accorded persuasive weight. If that standard is applied to Mr. Rinehart's testimony, and particularly this statement, the writ should be granted upon this ground also.

But even if the Court discounted this particular statement by Mr. Rinehart, it seems clear from his testimony as a whole that he himself thought of the appellee's sentence as being a sentence of twenty-five years rather than a sentence of twenty-five years to life. (See his statement at H49a above). When to this is added his unequivocal answer on cross examination that he was positive that he told the appellee that his sentence would be twenty-five years it is respectfully submitted that the weight of the evidence on this issue makes it clear that the appellee was innocently misinformed about the consequences of his plea and about the maximum punishment to which he was exposing himself. Therefore, the appellee requests the writ be affirmed upon this additional grounds also.

CONCLUSION

In conclusion, the appellee would like to briefly address himself to two other points in the appellant's brief.

The appellant suggests that by denying its appeal the Court will expose the judicial system to an avalanche of writs challenging guilty pleas and instituted at a time when memories have faded. Such a conclusion is totally unwarranted. If in reliance upon this case additional proceedings are commenced, they will be decided as this one has been decided on their peculiar facts. If the evidence proves that the guilty pleas were properly entered, the writs will be denied. If, however, evidence shows, as it did in this proceeding, that the plea was not a voluntary intelligent one, the writs will be and should be granted.

Such a procedure doesn't weaken the judicial system. It strengthens it.

Finally, the appellant says that even if the appellee did not have the necessary knowledge to plead intelligently and even if the law requires him to have such knowledge, the writ should be denied on the theory that the defect was merely one small part of the total circumstances involved. It is difficult to conceive of a more pernicious doctrine than this or one more violative of the fundamental rights of persons charged with a crime.

Therefore, the appellee respectfully requests that the order of the District Court be affirmed.

Dated: Auburn, New York
March 31st, 1975.

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF CAYUGA)

HELEN KOTYK, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides in the Village of Seneca Falls, County of Seneca and State of New York.

That on the 31st day of March, 1975 deponent served the within brief upon Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the respondent-appellant in this action, at Two World Trade Center, New York, New York 10047, the address designated by said attorney for that purpose, by depositing a copy of the same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Helen Kotyk

Helen Kotyk

Sworn to before me this
31st day of March, 1975.

Margaret A. Pease

MARGARET A. PEASE
Notary Public in the State of New York
Residing at Time of Appoint. Cayuga Co.
Official No. 1076
My Commission Expires Mar. 30, 1977